



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

February 10, 2004

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2004-0995

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 196180.

The Teacher Retirement System of Texas (the "system") received a request for the following information:

[A]ny documentation, produced by or received by [the system] during the last four months, or any tapes of committee or board meetings during the same period, related to the performance of the Texas Growth Fund [and] any documentation, including correspondence, related to the sale of [a named company].

You indicate that some responsive information will be provided to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.104, 552.107(1), 552.117, and 552.137 of the Government Code.¹

In addition, because you believe the privacy and/or property rights of Pathway Capital Management, L.L.C. ("Pathway"), the Texas Growth Fund ("TGF"), and those private

¹We note that you have marked some of the submitted documents as having already been made available to the requestor. This ruling does not address those documents.

entities in which Pathway and TGF invest may be implicated (the “private companies”), you notified Pathway and TGF of the request. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). You also invited Pathway and TGF, on the system’s behalf, to provide notice under section 552.305 to the private companies, and we understand that TGF sent twenty-two such notices. Several of the private companies which received notice from TGF submitted comments to this office, as did TGF. *Id.*

We first note that some of the submitted documents are not responsive to the instant request for information as they were created after the date the system received the instant request for information. Thus, such information is not responsive to the present request and this ruling will not address that information. We have marked these documents, which the system need not release in response to this request.

You note that this request seeks information that is subject to two previous rulings from this office. *See* Open Records Letter Nos. 2004-0330 (2004) and 2001-0847(2001). You inform us that some of the documents the system is seeking to withhold in this request are the same documents that the system was seeking to withhold in the previous ruling requests, and the system believes the same exceptions still apply to those documents. Therefore, as we understand you to assert that the four criteria for a “previous determination” established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that the system must rely on our decision in Open Records Letter Nos. 2004-0330 (2004) and 2001-0847(2001) with respect to the information requested in this instance that was previously ruled upon in those decisions.² *See* Gov’t Code § 552.301(f); Open Records Decision No. 673 (2001). To the extent that the information requested in this instance was not the subject of those prior rulings, we will address the submitted arguments.

The system claims that the highlighted information submitted in Exhibit E is excepted from public disclosure under section 552.107 of the Government Code. This section protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege under section 552.107(1), a governmental body has the burden of providing

²The four criteria for this type of “previous determination” are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general’s prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that the highlighted portions of Exhibit E reveal communications between attorneys for the system, or their representatives, and the attorneys’ clients or their representatives. You also state that these communications were not intended to be disclosed to persons other than those to whom communications were made in furtherance of the rendition of professional legal services to the system. Based on your representations and our review of the information that you seek to withhold under section 552.107(1), we conclude that this exception is applicable to the information at issue. Therefore, the system may withhold the highlighted information in Exhibit E under section 552.107(1). As you raise

no other exceptions for the remaining information in Exhibit E, it must be released to the requestor.³

The system and TGF assert section 552.104 of the Government Code for the remaining submitted information. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You assert that the system has specific marketplace interests in some of the information at issue because the system is constitutionally responsible for the investment of trust assets in excess of \$80 billion. *See* Tex. Const. art. XVI, §§ 67(a)(3) (requiring each statewide benefit system to have board of trustees to administer system and invest funds in accordance with prudent investor standard), (b)(1) (requiring that legislature establish "Teacher Retirement System of Texas to provide benefits for persons employed in the public schools, colleges, and universities supported wholly or partly by the state"). You state that the system has a fiduciary duty to the trust beneficiaries to diversify investments. *See* RESTATEMENT (THIRD) OF TRUSTS § 227(b), cmts. e-g (requiring trustees to diversify investments, if prudent, as part of their duty to act as prudent investors). You indicate that the system fulfills its responsibilities, in part, by investing in the private marketplace and assert that the system has an on-going interest in preserving its ability to compete effectively in this marketplace. *See* Gov't Code § 825.301(a) (authorizing system's board of trustees to invest in, among other things, "securities," as that term is defined by section 4 of the Securities Act, Tex. Civ. Stat. art. 581-4).

³Some of the documents marked for release contain or consist of confidential information that is not subject to release to the general public. *See* Gov't Code § 552.352. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the system receives a future request for this information from an individual other than the requestor or his authorized representative, the system should again seek our decision.

TGF advises us that

TGF is an investment trust created to allow public pension funds and permanent education funds in Texas to invest in the private equity marketplace. On November 8, 1988, Texans voted to approve a constitutional amendment that authorized certain public pension funds and permanent education funds to make private equity investments through a trust established under Article XVI, Section 70 of the Texas Constitution. In December 1991, TGF was established through the execution of a Declaration of Trust executed by the participating public funds. A second Declaration of Trust was established in 1995, and a third in 1998.

Further, TGF explains that it invests in the private equity marketplace on behalf of the system and other public pension funds and permanent education funds.

Based on these representations, we conclude that the system and TGF have demonstrated specific marketplace interests and may be considered "competitors" in the private marketplace for purposes of section 552.104. *See* Open Records Decision No. 593 (1991).

You also list several possible ways in which the release of portions of the submitted information would harm the system's marketplace interests. The information at issue concerns private equity funds in which the system is a limited partner (the "system funds"). The system funds raise capital to invest in various companies (the "portfolio companies"). You state that "a primary goal of these investments is to capitalize on proprietary or specialized knowledge." You represent that, if the system funds were required to release information about their portfolio companies, those funds might be denied the opportunity to invest in prospective portfolio companies or forced to agree to less favorable investment terms to compensate the portfolio companies for the risk that their information will be released. As an investor in these equity funds, the system would in turn suffer the consequences of being denied these investment opportunities. You also state that competitors of the portfolio companies could use the information at issue to compete with the portfolio companies and thereby harm the system's investment. You also assert that competing equity funds could use the information at issue to compete with the system funds and thereby undermine the system funds' negotiation position, rob the funds of investment opportunities, or force the system funds to agree to lesser returns; these consequences would be borne by all of the investors, including the system. Based on these representations as well as other arguments contained in your brief and in the brief submitted by TGF, we conclude that the system and TGF have shown that release of the information at issue will bring about a specific harm to the system's and TGF's marketplace interests. Accordingly, under section 552.104 of the Government Code, the system may withhold the remaining submitted information pertaining to portfolio companies. As our ruling on this issue is dispositive, we need not address the system's other arguments for this information or the claims made by the third parties.

In summary, the system must rely on our decision in Open Records Letter Nos. 2004-0330 (2004) and 2001-0847(2001) with respect to the information requested in this instance that was previously ruled upon in those decisions. The system may withhold the highlighted information in Exhibit E under section 552.107(1). The remaining submitted information in Exhibit E must be released to the requestor. Under section 552.104 of the Government Code, the system may withhold the remaining submitted information pertaining to portfolio companies.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 196180

Enc. Submitted documents

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